INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 114

MANUEL VACA, CALEB MOONEY, AND ERNEST F. KOBETT,
Petitioners

v.

NILES SIPES, Administrator of the Estate of BENJAMIN OWENS, JR., Deceased.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of the petitioners, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the petitioner has been obtained. Counsel for respondent has refused his consent.

INTEREST OF THE AFL-CIO

The Motion of the AFL-CIO to file a brief *amicus curiae* in this case in support of the petition for *certiorari* was granted by the Court, 384 U.S. 969. Our reasons for requesting leave to file a brief on the merits are substantially the same as those set forth in the Motion.

The AFL-CIO is a federation of one hundred and twenty-nine national and international unions with a total membership of approximately thirteen and a half million. The instant case involves a relatively small union which is not affiliated with the AFL-CIO. The questions presented, however, are of great importance to all unions and to the institution of collective bargaining.

Briefly stated, they are: What recourse does an employee have if his exclusive collective bargaining representative refuses to process his grievance to arbitration? May the employee bring suit in court, or does his exclusive remedy lie before the National Labor Relations Board? In either case, what showing must the employee make in order to obtain relief? Finally, if he makes out a cause of action, what relief should be afforded?

More than 90 percent of all collective bargaining agreements in the United States provide a grievance and arbitration procedure similar to the one involved in the instant case. 2 BUREAU OF NATIONAL AFFAIRS, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, 51:67 (1965). Indeed, one of the principal functions of a union during the periods when such an agreement is in effect is to process the grievances that arise. The AFL-CIO, as spokesman for the majority of American unions and their members, therefore has a profound interest in the answers given by the Court to the questions which this case presents. The brief *amicus curiae* tendered herewith discusses these general issues, on which

the Court has invited the Solicitor General to file a brief *amicus* for the United States.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying brief *amicus curiae* in the instant case.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

September, 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 114

MANUEL VACA, CALEB MOONEY, AND ERNEST F. KOBETT,
Petitioners

v.

NILES SIPES, Administrator of the Estate of BENJAMIN OWENS, JR., Deceased

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The interest of the AFL-CIO is set on pages vi-vii of the foregoing motion for leave to file a brief *amicus curiae.*

SUMMARY OF ARGUMENT

I

1. The first question presented here is whether a claim that an exclusive bargaining representative has breached its duty of fair representation (see *Steele* v. *Louisville and N. R. Co.*, 323 U.S. 192) in a situation covered by the National Labor Relations Act, is within the exclusive primary jurisdiction of the National Labor Relations Board, or is also cognizable by the courts. In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246, the Court held that, save in certain exceptional categories of cases the courts must defer to the exclusive competence of the Board in cases "arguably within the compass of §7 or §8 of the Act." We submit that *Garmon* and not its exceptions should be held to apply here since: (1) the subject matter of this suit is arguably within the compass of the Act; (2) this case does not fall within any of the recognized categories of cases over which the courts have concurrent jurisdiction; and (3) the applicable policy considerations indicate that the courts should not have concurrent jurisdiction over suits such as this so long as the Board asserts that it has jurisdiction.

2. It is indisputable that the subject matter of this suit, is arguably within the regulatory scope of the Act. This Court has several times noted that "there are differing views whether a violation of the duty of fair representation is an unfair labor practice," but the Court has not yet found it necessary to resolve that difference. *Humphrey* v. *Moore*, 375 U.S. 335, 344. The Board decisions establish that at the present time it considers any union breach of the duty of fair representation, including a wrongful refusal to process a grievance, to be an unfair labor practice under its so-called *Miranda* doctrine (*Miranda Fuel Co.*, 140 NLRB 181). Board jurisdiction under *Miranda* is likewise arguable as far as the sole lower court, which has had to

face the point squarely, is concerned. The Court of Appeals for the Second Circuit rendered three separate and divergent opinions in denying enforcement in *Miranda* (2-1). *NLRB* v. *Miranda Fuel Co.*, 326 F.2d 172. Quite clearly its decision does not put the question to rest.

In *Miranda* the AFL-CIO argued that claims that a union has breached its duty of fair representation for reasons unrelated to an employee's right to engage in or refrain from union activities should be remediable in the courts, and not before the NLRB. We continue to think that this position is sound; and we intend to so argue in an appropriate case before this Court. Should the Court accept this position it will then, of course, no longer be "arguable" that a suit like the present is within the primary jurisdiction of the Board. It would be possible for the Court to review the *Miranda* doctrine in this case, and should it reject it to sustain the jurisdiction of the courts below. That procedure, however, would sanction an initial determination by the courts, rather than the Board, as to whether the disputed activity here is protected under §7 of the Act or prohibited under §8. Hence it would be a repudiation of *Garmon*, and a return to the discredited and unworkable approach of *UAW* v. *Wisconsin E.R.B.*, 336 U.S. 245 (see *Garmon*, 359 U.S. at 245, footnote 4). Therefore we shall not in this brief address ourselves to the merits of the *Miranda* issue. The question whether, assuming *Miranda* to be sound doctrine, the courts nevertheless have concurrent jurisdiction, is of course before the Court in any event.

3. The Act, and the decisions of this Court, establish several categories of cases over which the courts have jurisdiction concurrently with the Board, but, we submit, this case is not within any of those classes of cases.

First, Section 303 of the Act authorizes suits for damages in federal and state courts for any activity which is an unfair labor practice under §8(b)(4). This is the single

exception to primary jurisdiction explicitly created by the Act itself. No other comparable exception has ben recognized by the Court.

Second, there are several categories of cases where courts have concurrent jurisdiction to consider various aspects of certain activities which may also come before the Board, in order to decide whether there has been a violation of some other law or a breach of contract. In none of these cases does the court pass on the question of whether the conduct in question is a violation of the National Labor Relations Act. For example, state courts may forbid, punish, or award damages for "conduct marked by violence and imminent threats to the public order," even though the conduct may constitute and unfair labor practice under §8(b)-(1) of the Act. *Garmon*, 359 U.S. at 247. Moreover, the courts, state and federal, may entertain a suit under §301 of the Taft-Hartley Act for a breach of a provision in a collective bargaining agreement even though the conduct alleged to constitute the breach would also be an unfair labor practice under the Act.

Third, it may be argued that *Humphrey* v. *Moore*, 375 U.S. 335, which we respectfully submit is unsound insofar as it extends the scope of concurrent jurisdiction, see p. 25, *infra*, supports concurrent jurisdiction in a case like the present. In that case the Court held that it had jurisdiction, pursuant to §301, over a suit to enjoin a discharge allegedly in violation of a collective bargaining agreement where it was claimed that the decision of the union-employer Joint Conference Committee approving the discharge "* * * was obtained by dishonest union conduct in breach of its duty of fair representation." However, the present suit is not for breach of contract, and is therefore not within *Humphrey* v. *Moore*. The plaintiff did not, as in *Humphrey* v. *Moore*, sue both the company and the union, but only the latter. The plaintiff did not, as in *Humphrey* v. *Moore*, seek to enforce alleged rights under the contract, or, alter-

natively, damages for its breach, since he only sought damages from the union for its failure to take Owens' grievance to arbitration and this refusal cannot be considered a breach of a contract because it is evident that the contract did not require the union to carry this grievance or any other to arbitration. And, while it might be contended that the layoff of Owens was in violation of the contract, the union was not privy to that layoff.

4. Several considerations urge that the jurisdiction of the Board over breach of the duty of fair representation be exclusive; while, conversely, the factors which have led the Court to accord concurrent jurisdiction to courts or arbitrators over certain other categories of conduct are inapplicable here.

If the courts have concurrent jurisdiction to entertain suits for breach of the duty of fair representation, they will be performing the precise role which the Board asserts is its under the Act, and will be interpreting the very provisions which the Board administers. Thus all of the determinations of both legal and factual issues which the courts would have to make are within the Board's claimed competence. The overlap is total. In no case (§303 aside) has the Court found concurrent jurisdiction in such a situation. And certainly it is clear that this case does not fit into the major exception to *Garmon* since it concerns no "• • • overriding state interest such as that involved in the maintenance of domestic peace." (359 U.S. at 247). Finally, this case involves no clear congressional policy running counter to the normal optimum of unified administration, such as those favoring judicial enforceability of collective bargaining agreements, and arbitration of grievances.

The only argument, so far as we are aware, in favor of concurrent court jurisdiction over suits for breach of the duty of fair representation, is that such suits are maintainable under *Humphrey* v. *Moore* if they can be and are

cast in the form of suits for breach of contract under §301, and that "continuing difficulty" in identifying such suits can be avoided by judicial jurisdiction over all suits for unfair representation. There are at least two answers to this. The determination whether a suit is one for breach of contract under §301 is surely one of the simpler tasks that confronts the courts. Further, we respectfully suggest that a proper regard for normal industrial relations practices indicates that the line of delineation as to whether a suit involving a claim of unfair representation may be maintained under §301 should be whether the crux of the claim is breach of contract or breach of the duty of fair representation, and not simply whether the claim can be phrased to raise some issue under a contract.

II

1. It is clear that the courts below used an erroneous standard of liability and awarded improper relief. There can be no doubt that federal law controls both as to the standard of liability, and as to remedy. The doctrine of fair representation originated with this Court as an interpretation of the Railway Labor Act and the NLRA in the light of the Constitution. By the same token, matters of remedy, such as damages, are controlled by federal law. Any state cause of action which may once have existed for breach of the duty of fair representation has been superseded by federal law.

The federal standard laid down by this Court to guide unions in their discharge of their responsibilities toward the employees they represent accords unions "a wide range of reasonableness." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338. The courts below failed to follow this standard and instead imposed a requirement which in effect forces unions to process all grievances to arbitration at peril of liability for damages. Such a rule of law imperils the whole arbitration process. At the present time, both companies and unions act on the theory that each of the parties

to the agreement has an obligation to screen out grievances by attempting in good faith to settle them in the lower steps of the procedure. The employer must be willing to grant grievances which appear to have merit, and the union must be willing to withdraw those which appear to lack merit. For example, the figures the AFL-CIO obtained as to the contract between the United Steelworkers and the United States Steel Corporation show that only 5.6% of the 24,351 grievances filed between 1960 and 1965 went to arbitration. These figures show not only that most grievances are in fact settled in the lower steps, but, more importantly, that, because of the sheer volume of grievances involved, the procedure could not possibly operate effectively if the parties failed to settle the vast majority of grievances short of arbitration.

2. We submit that federal law does not sanction the award of punitive damages for breach at the duty of fair representation. Punitive damages have not, except in this case, as far as we have found, been awarded in any of the suits which have been entertained by the courts for breach of the duty of fair representation, or for a breach of contract under §301, or for a violation of §303. In the cases where it finds a breach of the duty of fair representation, the NLRB enters a cease and desist order, and, where appropriate, also orders reinstatement and back pay. If the union had taken Owens' case to arbitration and, improbably, won, he would have been reinstated with back pay minus interim earnings. There is thus neither policy, precedent, or analogy for sustaining the award of punitive damages in this suit.

ARGUMENT

I

THE NLRB HAS EXCLUSIVE PRIMARY JURISDICTION OVER THIS CONTROVERSY

In *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, this Court held that a union which is by federal statute the ex-

clusive collective bargaining representative of all employees owes them a duty to represent them fairly. That case arose under the Railway Labor Act which does not provide for administrative enforcement of its substantive provisions, and the Court accordingly held that (p. 207):

> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative * * * is of judicial cognizance. * * * For the present command there is no mode of enforcement other than resort to the courts * * * ."

Since 1962 the National Labor Relations Board has repeatedly held that in cases covered by the National Labor Relations Act a union's breach of its duty of fair representation is an unfair labor practice remediable by the Board. (See, *infra*, pp. 11-12) The first question here presented is whether a claim of unfair representation, in a situation covered by the National Labor Relations Act, is within the exclusive primary jurisdiction of the Board, or is also cognizable by the courts. We contend that the jurisdiction of the Board is exclusive.

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246, the Court held that, save in certain exceptional categories of cases such as those involving breach of the peace, the courts must defer to the exclusive competence of the Board in cases "arguably within the compass of §7 or §8 of the Act." See also *Local 100, United Association of Journeymen* v. *Borden*, 373 U.S. 690, 693.

We submit that the subject matter of this suit (1) is arguably within the compass of the Act; (2) that it does not fall within any of the recognized categories of cases over which the courts have concurrent jurisdiction; and (3) that the courts should not, as a matter of policy, have concurrent jurisdiction over suits like this so long as the Na-

tional Labor Relations Board asserts that it has jurisdiction.

The first two of these propositions are quite clear and easily demonstrated. The third proposition is more doubtful, but we submit that on balance the applicable considerations weigh in favor of exclusive primary jurisdiction in the Board.

A. The Subject Matter of this Suit is Arguably Covered by the Act

It has been settled, at least since *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, that the NLRB has, in general, exclusive primary jurisdiction to determine the reach of the National Labor Relations Act, and that, except for certain categories of cases (considered *infra*, pp. 15-22) over which the courts have concurrent jurisdiction, it is for the Board, and not the courts, to decide in the first instance whether an activity arguably subject to the Act is within the protections of §7 or §8, is "left * * * free for the operation of economic forces,"[1] or is altogether outside the intendment of the Act. At an earlier stage in the development of preemption doctrine this Court in at least one instance sustained the assertion of initial jurisdiction by the courts because this Court ultimately concluded that the activivity was outside the Act, even though the issue was an arguable one. *United Auto Workers* v. *Wisconsin ERB*, 336 U.S. 245. In *Garmon*, however, the Court declared, referring to *United Auto Workers* v. *Wisconsin ERB*, that (359 at 245, footnote 4):

> "The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application."

---

[1] *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 480-481. See also *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252, 260.

It is indisputable that the subject matter of this suit, *i.e.*, the union conduct challenged herein, is *arguably* within the regulatory scope of the Act. Indeed the question whether a union's breach of its duty of fair representation is an unfair labor practice under the Act, even if unrelated to encouraging union membership or activities, is one of the most controversial legal issues now before the Board and the courts.[2] This Court itself has several times noted that "there are differing views whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act," but the Court has not yet found it necessary to resolve that difference. *Humphrey* v. *Moore*, 375 U.S. 335, 344. See also *Local 100, United Association of Journeymen* v. *Borden*, 373 U.S. 690, 696, footnote 7; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652.

It has been settled law since *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, that a union which is by statute the exclusive bargaining representative of all of the employees in a unit owes all of them a duty to represent them fairly. While the *Steele* case arose under the Railway Labor Act, the provisions of §9(a) of the National Labor Relations Act as to exclusive representation are comparable, and the same duty of fair representation arises under that Act. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337; *Syres* v. *Oil Workers Int. Union*, 350 U.S. 892; *Humphrey* v. *Moore*, 375 U.S. 335, 342. These decisions likewise make it clear that the bargaining representative's right to resolve grievances or contractual issues, so long as it acts in good faith, is protected by the Act.

---

[2] See, e.g., Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 173-174 (1957); Note, "Administrative Enforcement of the Right to Fair Representation: The *Miranda* Case," 112 U. Pa. L. Rev. 711 (March, 1964); Sovern, *Legal Restraints on Racial Discrimination in Employment*, 143-175 (1960).

> "The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility." (*Huffman*, 345 U.S. at 339).

Prior to 1962 the Labor Board never took the position that a union's breach of its duty to represent fairly all employees in the unit was an unfair labor practice under §§ 7 and 8 of the Act, unless the discrimination were related to "union membership, loyalty, the acknowledgement of union authority, or the performance of union obligations." *Miranda Fuel Company*, 140 NLRB 181, 197 (dissenting opinion) (1962).[3] However, in the *Miranda* case the Board held by a vote of three to two that union induced discrimination against an employee, which was "arbitrary and without legitimate purpose," violated §8(b)(1) and (2) of the Act, even though the discrimination was not related to union membership or activities or fealty; and that the employer had likewise violated §8(a)(1) and (3).

The Board has since applied the *Miranda*[4] doctrine in a number of cases, including one decided as recently as June 17, 1966. See, e.g., *Cargo Handlers, Inc.*, 159 NLRB No. 17 (June 17, 1966); *Local 12, United Rubber Workers*, 150 NLRB 312 (1964); *Maremont Corporation*, 149 NLRB 482 (1964); *Local 1367, International Longshoremen's Associa-*

---

[3] On the other hand, discrimination with regard to employment "to encourage or discourage membership" in a union is specifically barred by the Act, §§8(a)(3) and 8(2), and these bans extend as well to discrimination encouraging union fealty or loyalty, even though no question of membership is involved. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17; *cf. Local 357, International Brotherhood of Teamsters* v. *NLRB* 365 U.S. 667.

[4] Since the *Miranda* decision two of the Board members who were in the majority have left the Board, and been replaced by new appointees. The situation at present appears to be that two members (Brown and Jenkins), adhere to the *Miranda* doctrine; that the two members who dissented in *Miranda* (Chairman McCulloch and Member Fanning), continue to reject the doctrine; and that the newest member, Zagoria, has not as yet voted on the issue.

tion, 148 NLRB 897 (1964); *Hughes Tool Company*, 147 NLRB 1573 (1964). While it is not clear whether a majority of the present members of the Board accept or reject *Miranda*, inasmuch as that doctrine has not been repudiated and is still being applied by the Board, it seems indisputable that a claim for breach of a union's duty of fair representation is, as far as the Board is concerned, arguably within the Board's jurisdiction.

Board jurisdiction under *Miranda* is likewise arguable as far as the courts are concerned. The Court of Appeals for the Second Circuit denied enforcement in *Miranda*, two to one, with one judge rejecting the Board's *Miranda* doctrine in toto, one judge rejecting it in part, and one judge voting to uphold the Board. *NLRB* v. *Miranda Fuel Co.*, 326 F.2d 172. See also *NLRB* v. *Local 294, Teamsters Union*, 317 F.2d 746 (2d Cir.). However, as stated *supra*, p. 10, this Court has several times taken note of the Board's *Miranda* doctrine, and reserved decision as to its validity.

The AFL-CIO argued in a brief *amicus* in the Court of Appeals in *Miranda* that the legal doctrine announced by the Board majority in that case is erroneous; and that a union's breach of its duty of fair representation is not an unfair labor practice unless it is related to an employee's right to engage in or refrain from union activities. We further took the position that a breach of the duty of fair representation is remediable in the courts, and not before the NLRB.[5]

---

[5] The brief for the AFL-CIO stated, pp. 25-26:

> "We naturally are not advocating that an employee whose section 9 right to fair representation is violated, on any ground, should be without a remedy. But the proper forum in which to seek redress for unfair representation or discrimination, when it is not based upon an employee's union activities, is a court and not the NLRB. A number of leading decisions establish that a union's duty to represent fairly is judicially enforceable, whether that duty arises under the Railway Labor Act or the National Labor Relations Act."

We continue to think that both of these positions are sound; and we hope to so argue in an appropriate case before this Court. If the Court ultimately rejects the Board's *Miranda* doctrine, or if a majority of the members of the Board repudiate it, it will then of course no longer be "arguable" that a suit like the present is within the primary jurisdiction of the NLRB, and the courts will accordingly then be free to assert jurisdiction. *Retail Clerks Int. Assn.* v. *Schermerhorn*, 373 U.S. 746, 755-756.[6] Meanwhile, however, it is patent that claims like that on which this suit is based are arguably within the primary jurisdiction of the Board.

The court below, without acknowledging the existence of the Board's *Miranda* doctrine, apparently took the position that a union's breach of its duty of fair representation cannot constitute an unfair labor practice unless the union induces the employer to discriminate against an employee with respect to his employment; and the court stressed that "the union had nothing to do with Owens being discharged." (R. 215.) The court, in other words, thought that not every union breach of the duty of fair representation is arguably an unfair labor practice; and that a mere failure to take to arbitration a layoff which originated with the employer cannot be an unfair labor practice.

However that is not the position the Board has taken. The Board apparently considers that any union breach of the duty of fair representation is an unfair labor practice: its *Miranda* doctrine is coextensive with the Court's *Steele* doctrine. Put another way, the Board is undertaking to enforce, in situations covered by the National Labor Relations Act, the duty of fair representation articulated by the Court in *Steele*. Thus the Board has declared (*Independ-*

---

[6] *Local 12, United Rubber Workers*, 150 NLRB 312, which presents the *Miranda* issue, is pending decision in the Fifth Circuit.

ent Metal Workers Union, Local No. 1, 147 NLRB 1573, 1575):

> "When the Supreme Court enunciated the duty of fair representation in *Steele* and *Tunstall, supra,* which were Railway Labor Act cases, the Court emphasized in each case the lack of an administrative remedy as a reason for holding that Federal courts constitute a forum for relief from breaches of the duty. In this connection, it should be noted that provisions of the Railway Labor Act * * * are enforcible by the Federal courts, not by an administrative agency. When the Labor Board, in recognition of the *Steele* and *Tunstall* doctrines, held that under the Wagner Act statutory bargaining representatives owe to their constituents a duty to represent fairly, the Board's holding necessarily was confined to representation proceedings because the Board had no power to issue an order against a labor organization. After enactment of the Taft-Hartley Act, however, an administrative remedy became available in our view * * *."

Furthermore, the Board has specifically held that a union's failure to process grievances through arbitration may be an unfair labor practice. *Local 12, Rubber Workers Union,* 150 NLRB 312, 57 LRMR 1535, now pending in the Fifth Circuit on petition for enforcement. The Board declared (57 LRRM at 1536):

> "Moreover, the duty of fair representation may be breached not only by action, but by inaction as well, such as the refusal to process a grievance."

And the Board in that case ordered the union to process certain grievances through arbitration.

It would, of course, be possible for the Court to review the *Miranda* doctrine in this case, and if it rejects it for

the Court to sustain the jurisdiction of the courts below. That, however, would involve the repudiation of *Garmon*, and a return to the discredited and unworkable approach of *UAW* v. *Wisconsin E.R.B.* Hence we shall not in this brief address ourselves to the merits of the *Miranda* issue.

The question whether, assuming *Miranda* to be sound doctrine, the courts nevertheless have concurrent jurisdiction, is of course before the Court, although the Court may prefer to dispose of the case upon the merits without deciding the jurisdictional issue, as in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330.

B. This Suit is not a Case Over Which the Courts Have Been Held to Have Concurrent Jurisdiction

The Act and the decisions of this Court establish several categories of cases over which the courts have jurisdiction concurrently with the Board, but, we submit, this case is not within any of those classes of cases; or within the rationales which led to the recognition of those categories.

1. Section 303 of the Act explicitly authorizes suits for damages in federal and state courts for any activity which is an unfair labor practice under §8(b)(4). This is the *only* clear instance in which the Board and the courts have concurrent jurisdiction to apply to the Act, that is where the courts have authority to adjudicate directly and not collaterally whether conduct constitutes an unfair labor practice. It is significant that this is the single exception explicitly created by the Act itself; and that no other such exception has been recognized by the Court; for there is a high potential of conflict when the courts and the Board both have authority to adjudicate the legality of the same conduct under the same statutory provision. See, e.g., *United Brick & Clay Workers of America* v. *Deena Artware, Inc.*, 198 F.2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897, *rehearing denied*, 344 U.S. 919.

Put another way, §303 is the only provision in the Act which creates a private right of action for an unfair labor practice. And what is here being sought is, assuming the *Miranda* doctrine to be sound, the recognition of another private right of action for an unfair labor practice, with the likelihood of direct conflict between Board and courts that that would involve.

2. Section 14(b) grants or preserves the power of the States to ban union security agreements otherwise permissible under the Act; and this Court has held that §14(b) permits the state courts to enforce such state laws, beginning with, but not preceding, the actual execution of a contract violative of state law. *Retail Clerks Int. Assn., Local 1625* v. *Schermerborn*, 375 U.S. 96, 105.[7]

3. The state courts may forbid, punish, or award damages for "conduct marked by violence and imminent threats to the public order," even though the conduct may constitute an unfair labor practice under §8(b)(1) of the Act. *San Diego Building Trades Council, etc.* v. *Garmon*, 359 U.S. 236, 247.[8]

> "State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." (359 U.S. at 247.)

[7] If a violation of a state union-security law authorized by §14(b) is a federal unfair labor practice under the Act—a point never decided—then the Board and the state courts have concurrent jurisdiction over the conduct constituting the violation. They would not, however, be applying the same statutory provisions, though the authority of both would stem from §14(b); for the Board would be enforcing §§8(b)(2) and 8(a)(3) of the Act, while disregarding the proviso to the latter because of §14(b), whereas the state courts would be enforcing the state statutes permitted to operate by §14(b). See *Retail Clerks Int. Assn.* v. *Schermerborn*, 373 U.S. 746, 756-757.

[8] Last term the Court, in a 5-4 decision, extended its "violence" doctrine to embrace civil actions for libel occurring during a union organizing campaign. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53.

In these cases, the courts apply state law and the Board the federal Act.

The jurisdictional reach of the courts and the Board is likewise different. Court jurisdiction is limited to dealing with violence or threats thereof;[9] while the jurisdiction of the Board reaches violence only if it coerces employees in their exercise of rights under the Act, but also embraces nonviolent unfair labor practices. Thus the area of overlap between courts and Board is likely to be small.

Some overlap in jurisdiction between Board and courts, and "fragmentation" is the handling of the dispute, is, however, unavoidable. As the Court declared in *United Auto Workers* v. *Wisconsin E.R.B.*, 351 U.S. 266, 272:

> "It seems obvious that §8(b)(1) was not to be the exclusive method of controlling violence even against employees, much less violence interfering with others approaching an area where a strike was in progress. No one suggests that such violence is beyond state criminal power."

State criminal jurisdiction being clear, the area of controversy has been, rather, whether state court jurisdiction extends to damage and equity suits, and whether the States may provide an administrative remedy.[10]

4. In *International Assn. of Machinists* v. *Gonzales*, 356 U.S. 617, the Court upheld the jurisdiction of the state courts over a suit whose "crux" (p. 618) was alleged wrongful expulsion from union membership. The expulsion had resulted in employment discrimination, and while the principal relief sought and granted was reinstatement to membership, the state courts also awarded damages for lost

---

[9] *Youndahl* v. *Rainfair, Inc.*, 355 U.S. 131.

[10] See, e.g., *United Auto Workers* v. *Wisconsin E.R.B.*, 351 U.S. 266, 274-275, 275-276 (dissenting opinion); *United Auto Workers* v. *Russell*, 356 U.S. 634, 647, 659 (dissenting opinion); *United Mine Workers* v. *Laburnum Const. Corp.*, 347 U.S. 656, 669-671 (dissenting opinion).

wages and for physical and mental suffering. The courts' jurisdiction to order reinstatement was conceded, but the jurisdiction to award damages was challenged on the ground that employment discrimination was within the jurisdiction of the Board. The jurisdiction of the courts was upheld, however, on the grounds that the crux of the action—expulsion from membership—fell outside the area of Board concern.

Subsequent cases suggest that *Gonzales* may have been undercut by *Garmon* as regards jurisdiction to award damages; and they at any rate make it clear that if the "crux" or essence of the action is employment discrimination arguably subject to the Board's jurisdiction, the courts may not entertain the suit. *Local 100, United Association of Journeymen* v. *Borden*, 373 U.S. 690; *Local 207, Int. Assn. of Bridge, etc., Workers* v. *Perko*, 373 U.S. 701.

In the present suit not only the crux but the totality of the suit is arguably within the Board's jurisdiction.

5. *Smith* v. *Evening News Assn.*, 371 U.S. 195, held that the courts, state and federal, may entertain a suit under §301 of the Taft-Hartley Act for breach of a provision in a collective bargaining agreement, that there shall be no discrimination against any employee for union membership or activity, even though the conduct alleged to constitute the breach would also be an unfair labor practice under the Act.[11]

The same doctrine was applied in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, to a suit to compel arbitration of issues that could have been adjudicated by the Board in unfair labor practice proceedings under the Act. The Court declared (p. 272):

---

[11] Justice Black dissented. Under the view expressed in his opinion it is clear that the courts could not entertain suits like the present, since the questioned activity is arguably covered by the Act.

> "By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to 'industrial peace' and which may be dispositive of the entire dispute, are encouraged."

Conduct which is arguably an unfair labor practice is often also violative of a collective bargaining agreement, though breach of contract is not itself an unfair labor practice. A holding that breaches of contract are not remediable by suit under §301, or via grievance and arbitration, if the conduct constituting the breach is also arguably an unfair labor practice, would thus have run counter to the provision in §301 that collective bargaining agreements shall be judicially enforceable, and to the policy of the Act (§203(d)) favoring arbitration of disputes under collective agreements.

6. We come then to *Humphrey* v. *Moore*, 375 U.S. 335, and to the key question whether that decision supports concurrent jurisdiction in a case like the present; for it is quite clear that none of the other decisions of the Court do.

In *Humphrey* v. *Moore* individual employees brought suit to enjoin their discharge. They alleged that their discharge would violate the seniority provisions of the collective bargaining agreement; and that a determination adverse to their claims which had been made by the union-employer Joint Conference Committee [12] violated the agreement and

> "* * * was obtained by dishonest union conduct in breach of its duty of fair representation and that a decision so obtained cannot be relied upon as a valid excuse for his discharge under the contract." (375 U.S. at 342.)

[12] Referral to the Joint Conference was the third step under the contract grievance machinery. Decisions of the Joint Conference Committee were final and binding, but if the Committee failed to reach agreement the matter could be referred to arbitration.

The Court held, first, that since the suit was for breach of contract it was maintainable under §301. It declared (375 U.S. at 344):

> "Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is or, arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, *Smith* v. *Evening News Assn., supra,* subject of course, to the applicable federal law." (Footnotes omitted).

On the merits, the Court held that the interpretation given the collective bargaining agreement by the Joint Committee was a permissible one, and that there was no fraud or breach of duty by the union.

Justices Goldberg and Brennan, and (perhaps) Douglas, concurring, took the position that the suit was not maintainable as one for breach of contract under §301, for the reason that the union and the employees were free to resolve the dispute by amending the contract or entering into a grievance settlement; and that no breach of good faith was shown.

Justice Harlan, concurring in part and dissenting in part, agreed with the Court majority that the suit was maintainable under §301 as one for breach of contract; but urged that the Court should decide the further question whether the suit would lie as one for breach of the duty of fair representation or whether, in that aspect, it was preempted by the primary jurisdiction of the NLRB.

We respectfully submit, as developed *infra* p. 25, that the *Humphrey* v. *Moore* extension of concurrent jurisdiction is unsound, so long as the Board's *Miranda* doctrine

stands, as respects suits whose crux is breach of the union's duty of fair representation, even though the suit be framed as one for breach of contract under §301. However, the present suit is not for breach of contract, and is not within *Humphrey* v. *Moore*.

The plaintiff did not, as in *Humphrey* v. *Moore*, sue both the company and the union, but only the latter. The plaintiff did not, as in *Humphrey* v. *Moore*, seek to enforce alleged rights under the contract, or, alternatively, damages for its breach, but sought damages from the union for its failure to take his grievance to arbitration. And the plaintiff brought a separate action, which is still pending, against the company for breach of the collective bargaining agreement. (*Owens* v. *Swift & Co.*, No. 631293, Circuit Court, Jackson County, Missouri.)

The brief in opposition to the petition for certiorari asserts that the basis of the suit is (pp. 1-2, 5):

> "that the Union, as the member's representative, breached a collective bargaining agreement with the employer, of which the members were beneficiaries, by arbitrarily and without just cause or excuse (and thus with legal malice), refusing to carry the member's grievance against the employer through the fifth, arbitration, step of a grievance procedure set forth in the bargaining agreement."

However, it is evident that the contract did not require the union to carry this grievance or any other to arbitration, so that the union's failure to do so cannot possibly be regarded as a breach of contract. It might be contended that the layoff of Owens was in violation of the contract, but the union was not privy to that layoff. As the court below said (R. 215):

> "Here the Union had nothing to do with Owens being discharged. It is evident that the idea originated with the employer. * * * Nor is there any evidence to

indicate that the Union representatives took any affirmative action to prevent the re-employment of Owens."

If there was any breach of contract it was by the employer, and, as stated, the plaintiff has not sued the employer in this action.

Thus the present suit is not maintainable under any of the exceptions yet recognized to the rule that the NLRB has exclusive primary jurisdiction of matters arguably subject to the Act. We urge that no new exception be created encompassing such suits as the present.

C. The Jurisdiction of the Board over Breach of the Duty of Fair Representation Should be Exclusive

Several considerations urge that the jurisdiction of the Board over breach of the duty of fair representation be exclusive; while, conversely, the factors which have led the Court to accord concurrent jurisdiction to courts or arbitrators over certain categories of conduct are inapplicable here.

1. The Board's primary jurisdiction under §10 to adjudicate unfair labor practices is exclusive, save for the explicit statutory exception in §303. While courts or arbitrators have concurrent jurisdiction to consider various aspects of certain activities which may also come before the Board, they do not decide whether these activities constitute unfair labor practices under §§7 and 8 of the Act, but rather whether they are in breach of a collective bargaining agreement, or of some provision of state or federal criminal or civil law. Thus the likelihood of conflicting interpretations of the Act is considerably diminished.[13]

[13] Questions involving the interpretation of the Act do come before the courts collaterally, as in breach of contract suits or actions to enjoin picket line conduct, since the courts may not ban or amerce for conduct protected by the Act. See, e.g., *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95; *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62.

If, however, the courts have concurrent jurisdiction to entertain suits for breach of the duty of fair representation, they will be performing the precise role which the Board asserts is its under the Act, and will be interpreting the very provisions which the Board administers. As the Court declared in *Garner* v. *Teamsters Union*, 346 U.S. 485 490-491:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

2. Not only is the "crux" [14] of the present controversy arguably within the jurisdiction of the Board, but the Board's asserted jurisdiction embraces this controversy in its entirety, as respects both facts and law. All of the determinations of both legal and factual issues which the courts have made are within the Board's claimed competence. The overlap is total. In no case (§303 aside) has the Court found concurrent jurisdiction in such a situation.

3. The desirability of avoiding "fragmentation" of a dispute, stressed in *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 272, can be met by exclusive Board jurisdiction, since the entire controversy is within its asserted reach.

4. The diversity of remedies would encourage undesirable forum shopping, if court jurisdiction were sustained. The court below sustained an award of $7000 for actual damages and $3000 for punitive damages. The Board, on the other hand would at most simply have ordered the union to process the grievance to arbitration. *Local 12, Rubber Workers Union*, 150 NLRB 312. Diverse periods of limitations would likewise result. *Cf. UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696.

---

[14] *International Association of Machinists* v. *Gonsales*, 356 U.S. 617, 618; *United Association* v. *Borden*, 373 U.S. 690, 697.

This diversity of remedies argues against, not in favor of, concurrent jurisdiction. As the Court said in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247:

> "[S]ince remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict."

5. This case concerns no "* * * overriding state interest such as that involved in the maintenance of domestic peace." *Garmon*, 259 U.S. at 247.

6. This case involves no clear congressional policy running counter to the normal optimum of unified administration, such as those favoring judicial enforceability of collective bargaining agreements, and arbitration of grievances.

7. The only argument, so far as we are aware, in favor of concurrent court jurisdiction over suits for breach of the duty of fair representation, is that such suits are maintainable under *Humphrey* v. *Moore* if they can be and are cast in the form of suits for breach of contract under §301, and that "continuing difficulty" in identifying such suits can be avoided by judicial jurisdiction over all suits for unfair representation.[15]

There are at least two answers to this.

The determination whether a suit is one for breach of contract under §301 is surely one of the simpler tasks that confronts the courts; and it is in any event a determination which has to be made in all suits brought under §301 which do not involve claims of unfair representation. Thus far *Humphrey* v. *Moore* is the only §301 suit which included a

---

[15] Sovern, *Legal Restraints on Racial Discrimination*, 174 (1966).

claim of unfair representation, though there has been a large volume of §301 litigation.

Further, we respectfully suggest that the proper line of delineation as to whether a suit involving a claim of unfair representation may be maintained under §301 should be whether the crux of the claim is breach of contract or breach of the duty of fair representation, and not whether the claim can be phrased to raise some issue under a contract. Thus an employee can sue for breach of the wage provisions of a collective bargaining agreement, at least in the absence of any provision in the agreement making arbitration or suit by the union the exclusive remedy,[16] and there can be little doubt that the crux of such a claim is the alleged breach of contract. In a suit like the present, on the other hand, it is evident that the crux of the claim is the union's alleged breach of its duty of fair representation, by its failure to take the plaintiff's grievance to arbitration. Such a suit should not be maintainable under §301, even though the grievance of course arose under a collective bargaining agreement. If an employee sues to enforce alleged rights under a collective agreement, and the union and the employer have undertaken to abrogate the claimed rights, either by negotiating a new agreement or via settlement of a grievance, a question arises whether the crux of the claim is for breach of contract or for unfair representation. Cf. *Humphrey* v. *Moore*, 375 U.S. 335. To make the answer turn on whether the abrogation was undertaken by way of a new contract or by way of a grievance settlement exalts form over substance and disregards normal industrial relations practice. It appears to us that in either case the essence of the employee's claim is unfair representation by the union, or by union and employer acting in collusion.

---

[16] *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 657-658.

In any event, however, whether the crux test be applied or the test whether the claim is posed as one for breach of contract, it is clear that the present suit does not fall within §301.

In short, we submit that no major policy consideration argues for concurrent judicial jurisdiction; while several weigh against it.

II

THE COURTS BELOW USED AN ERRONEOUS STANDARD OF LIABILITY, AND AWARDED IMPROPER RELIEF

A. Disposition by the Courts Below

1. *The standard of liability used.* The trial court instructed the jury that it might bring in a verdict for the plaintiff if it found that the union (R. 161):

> "* * * arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if so), refused to carry said grievance, difference and disagreement, if any, through the fifth step, if so, and thus prevented, if so, plaintiff from completing pursuit of his administrative remedies in the above respect * * *"

If this gobbledegook means anything, it is that it was up to the union to justify to the jury the union's refusal to take the grievance to arbitration.

The Missouri Supreme Court explicitly approved this instruction, and concluded that there was sufficient evidence from which the jury could have found "the foregoing issue" in favor of the plaintiff. (R. 216-7.) The court then recited evidence which bore, not on the union's good faith or lack of it in refusing to take the grievance to arbitration, but

on whether Owens was in fact physically able to work. (R. 217.) Thus the state Supreme Court in effect held that the jury could properly find for the plaintiff if there was evidence that Owens was actually able to work.

2. *Relief awarded.* The verdict awarded the plaintiff $7000 actual and $3300 punitive damages. Since the prayer for punitive damages was in the amount of $3,000, the state Supreme Court required a remittitur in the amount of $300. (R. 217).

B. Federal Law Controls As to Both Standard and Remedy

It is quite clear that federal law controls both as to the standard of liability, and as to remedy.

The doctrine of fair representation originated with this Court in *Steele* as an interpretation of the Railway Labor Act in the light of the Constitution. (See 323 U.S. at 202-203). As respects situations covered by the National Labor Relations Act, the doctrine is similarly derived from the provisions of that Act. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337-339. Federal law controls on the related question of the scope of judicial review of arbitration awards under collective bargaining agreements. *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593. Federal substantive law would, of course, likewise control if the suit rested on alleged breach of the collective bargaining agreement. *Humphrey* v. *Moore,* 375 U.S. 335.

It is no less clear that matters of remedy, such as damages, are controlled by federal law. See *Steele,* 323 U.S. at 207. In *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, the Court held that (p. 652):

> "• • • federal labor policy requires that individual employees wishing to assert contract grievances must

> *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress."

And the Court added:

> "If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available."

That these "differences" are likewise resolvable by federal law is apparent. Any state cause of action which may once have existed for breach of the duty of fair representation has been superseded by federal law, and that law controls both as to substantive law and damages. *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 476.

C. A Union May Refuse to Arbitrate a Grievance If It Acts in Good Faith

The opinion of the court below leaves doubt whether it held that a union must take every case to arbitration if the grievant insists, or that the union acts at its peril in refusing to go to arbitration if a jury later finds the grievance meritorious. But there is no doubt that the court departed from the standards repeatedly laid down by this Court to guide unions in their discharge of their responsibilities toward the employees they represent.

In *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338, the Court declared:

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

The Court quoted this language with approval in *Humphrey* v. *Moore*, 375 U.S. 335, 349, and it added:

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes."

Indeed, in *Humphrey* v. *Moore* the Court went well beyond what is required for the disposition of the present case, in holding that the union was not, so long as it acted in good faith, precluded from supporting the claims of some employees and opposing the antagonistic claims of other employees whom it represented.

Here, in contrast, the union represent no interest adverse to Owens. The State Supreme Court declared (R. 215),

> "Here the union had nothing to do with Owens being discharged. It is evident that the idea originated with the employer. There is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged. Nor is there any evidence to indicate that the union representatives took any affirmative action to prevent the re-employment of Owens. He was not expelled or suspended from union membership. The crux of plaintiff's claim was that he was wrongfully discharged by his employer and defendants wrongfully failed and refused to process his claim for reinstatement through the 'fifth step' and thus he was prevented from being restored to his job. Discrimination was neither alleged nor submitted to the jury as an element of the claim."

It is thus virtually uncontradicted that the union refused to take the plaintiff's grievance to arbitration simply because in the judgment of the union officials he did not have a good case.

Any doctrine that unions must process all grievances to arbitration at peril of liability for damages would imperil the whole arbitration process. As pointed out in *Ostrofsky v. United Steelworkers*, 171 F. Supp. 782, 791 (Md. 1959), *aff'd* 273 F.2d 614 (4th Cir., 1960), *cert. denied*, 363 U.S. 849, "Public officials and arbitrators, as well as employers, constantly remind union officials that they have a duty to discountenance disruptive and frivolous claims." And the same court declared (171 F. Supp. at 793):

> "The employer expects and demands that the Union 'screen' grievances, and the Union must do so if it wants the grievance procedure preserved and future grievances fairly considered by the employers.

This same conclusion has been reached by an attorney of wide experience in arbitration:

> "Many employers who accept arbitration as the avenue for labor dispute settlement during the contract term do so secure in the knowledge that the union has demonstrated responsibility and will not plague the employer with meritless claims. In fact, employers rely upon the union to sift out and reject, through investigation and the grievance machinery steps preliminary to arbitration, those employee complaints which lack substance." (Wyle, *Labor Arbitration and the Concept of Exclusive Arbitration*, 7 Boston College Industrial and Commercial Law Review 789).

Claims by employees that the employer has taken some action which violates the applicable collective bargaining agreement arise daily. Their resolution through grievance procedures, similar to those provided in the agreement involved in the instant case, with the right ultimately to go to arbitration, is normally the union's principal collective bargaining function during the contract term.

At the present time, both companies and unions act on the theory that each of the parties to the agreement has an obligation to screen out grievances by attempting in good faith to settle them in the lower steps of the procedure. It is understood, in other words, that there must be a willingness to reach a meeting of the minds, rather than to remain adamant on each grievance. The employer must be willing to grant grievances which appear to have merit, and the union must be willing to withdraw those which appear to lack merit.[17] Moreover, as a reflection of this understanding, whenever a substantial portion of the grievances filed in a plant are being taken to arbitration, that is regarded as a symptom of bad labor relations, a "distressed" situation requiring remedial action. See the discussions by the present Director of the Bureau of Labor Statistics, Arthur M. Ross, in Ross, *Distressed Grievance Procedures and their* Rehabilitation, in LABOR ARBITRATION AND INDUSTRIAL CHANGE PROCEEDINGS, 16th ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 104, 107 (1963). Dr. Ross notes that the most frequent cause of such breakdowns is the "refusal of international and local union officers to screen out the grievances * * *."

To illustrate how the grievance and arbitration procedure normally works, the AFL-CIO has obtained from its two largest affiliates, the United Steelworkers of American and the United Automobile Workers, figures showing the number and percentage of grievances settled in the lower steps of the grievance and arbitration procedure between these unions and two employers, United States Steel Corporation and General Motors Company.

---

[17] See Alexander, *Impartial Umpireships: General Motors—UAW*; in ARBITRATION AND THE LAW: PROCEEDINGS, 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 108, 128-129 (1959).

The figures for General Motors are as follows:

Year 1959		
Written Grievances	89,408	
Settled [18]—Step One	53,984	61.0%
Settled—Step Two	25,631	28.9%
Settled—Step Three	8,863	10.0%
Settled—Umpire	35	0.04%
Year 1962		
Written Grievances	114,611	
Settled—Step One	72,999	66.0%
Settled—Step Two	26,694	24.1%
Settled—Step Three	10,841	9.8%
Settled—Umpire	33	0.03%

The figures for United States Steel are:

Years 1960-1965	
Grievances Processed Beyond First Step [19]	24,351
Settled—Step Two	38%
Settled—Step Three	21%
Settled—Step Four	31%
Docketed for Arbitration	10%
Settled—Arbitration	5.6%

These figures show not only that most grievances are in fact settled in the lower steps, but, more importantly, that, because of the sheer volume of grievances involved, the procedure could not possibly operate effectively if the parties failed to settle the vast majority of grievances short of arbitration. This is especially clear once it is realized that in most cases the agreement provides that the employees must, without protest, accept, and work under, the employ-

[18] "Settled" as used here refers to grievances which are granted, compromised or dropped.

[19] No record is kept of the number of grievances filed but settled in the first step.

er's decision until he agrees to reverse it or is ordered to do so by an arbitrator. At the present time the delays which occur when a case goes through all the grievance steps, and which must be anticipated in even the most efficiently administered system, are not an insupportable hardship because multi-step grievances are exception rather than the rule. This, of course, would no longer be true if most grievances were processed to arbitration. Moreover, since the higher steps are more formal than the lower, it can be anticipated that grievances taken to arbitration would take longer to decide than the same grievance would today.[20]

D. Punitive Damages Were Not Allowable

We submit that federal law does not sanction the award of punitive damages for breach of the duty of fair representation.

1. *Suits for Breach of Duty.* Punitive damages have not, as far as we have found, been awarded in any of the suits which have been entertained by the courts for breach of the duty of fair representation, except the present suit. Usually the remedy granted has been simply to enjoin the breach. See, e.g., *Steele* v. *Louisville & N.R.R. Co.*, 323 U.S. 192. In one case the Court also awarded back wages minus actual earnings. *Central of Georgia R. Co.* v. *Jones*, 229 F.2d 648 (5th Cir. 1956), *cert. denied*, 352 U.S. 848.

2. *Labor Board Remedies.* In the cases where it finds a breach of the duty of fair representation, the Board, just as in other unfair labor practice cases, enters a cease and desist order, and, where appropriate, also orders reinstate-

---

[20] There is already some indication that the confused state of the law as to the nature and scope of the union's legal obligation to employees in handling their grievances has resulted in an increasing reluctance on the part of some unions to settle grievances. See e.g., report of a speech by Joseph Murphy, Vice President of the American Arbitration Relations Reporter, 61 LRRM 242.

ment and back pay.[21] See, e.g., *Miranda Fuel Company*, 140 NLRB 181, *enforcement denied*, 326 F.2d 172 (2d Cir.); *Cargo Handlers, Inc.*, 159 NLRB No. 17 (June 17, 1966). If, however, the union's breach was failure to take grievances to arbitration, rather than actively causing discrimination against employees, the Board simply orders the union to process the grievances. *Local 12, United Rubber Workers*, 150 NLRB 312. The Board does not in any circumstance award punitive damages: its "power to command affirmative relief is remedial, not punitive." *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 12.

It would be highly anomalous for the courts to award punitive damages in unfair representation cases, when the Board does not and may not.

3. *The Equal Employment Opportunity Law.* Title VII of the Civil Rights Act of 1964[22] which deals with equal employment opportunity, provides for the same relief that is available under the National Labor Relations Act. It reads (Sec. 706(g)):

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligency by the person or

[21] Interim earnings are deducted from back pay, and, pursuant to *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197, also amounts which the workers "failed without excuse to earn."

[22] Public Law 88-352, July 2, 1964, 78 Stat. 241.

persons discriminated against shall operate to reduce the back pay otherwise allowable."

Again, it would be anomalous for the courts to award punitive damages in suits for breach of the duty of fair representation under the Labor Act, but not in suits for employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

4. *Suits Under §301.* In the only case we have found on the point, the Court of Appeals for the Third Circuit, sitting *en banc*, held, by a divided vote, that punitive damages may not be awarded in a suit under §301. *Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 298 F.2d 277. Section 303 explicitly limits recovery to "the damages by him sustained"; and this Court has held that state common law, which awarded punitive damages, was suspended by §303. *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252.

5. *Arbitration Awards.* If the union had taken Owen's case to arbitration, and, improbably, won, he would have been reinstated with back pay minus interim earnings. See e.g., *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593.

There is thus neither policy, precedent, or analogy for sustaining the award of punitive damages in this suit.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief for petitioner, the judgment of the court below should be reversed.

Respectfully submitted,

J. ALBERT WOLL
General Counsel, AFL-CIO

ROBERT C. MAYER

LAURENCE GOLD
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D.C. 20005

THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N. W.
Washington, D.C. 20006

September, 1966